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No. 08-518

Supreme Court, U.S.
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In The Supreme Court of the United States

HASHMEL C. TURNER, JR.,

Petitioner,

v.

THE CITY COUNCIL OF THE CITY OF FREDERICKSBURG, VIRGINIA; THOMAS J. TOMZAK, in his official capacity as Mayor of the City of Fredericksburg, Virginia,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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ARGUMENT

Contrary to the brief filed by the City Council, it is hardly well-established that legislative prayer is government speech. Turner's arguments are not "preposterous." Instead, this case presents important issues under the Free Speech Clause (involving Councilor Turner's right to be free from viewpoint discrimination) and the Establishment Clause (arising from the City's prescribing nondenominational prayer and proscribing the use of the name of Jesus Christ, despite the lack of any finding that Turner's prayers ever "exploited the prayer opportunity" to proselytize or advance any one particular religion at the expense of another).

1. The Government Speech Doctrine is Not Well-Established.

The City Council is right about one thing – other courts certainly have analyzed legislative prayer under the Establishment Clause. And they have done so precisely because plaintiffs have sued state actors claiming the prayers violate the Establishment Clause. Yet the posture of those other cases – which did not involve a city councilor seeking to protect his own right to free speech in the face of blatant viewpoint discrimination – does not lead inexorably to the conclusion that legislative prayer is government speech. Nor do those other cases confirm that the government speech doctrine is so well-established that its application to this case was, as the City Council argues, a foregone conclusion.

Indeed, this Court's precedent applying the government speech doctrine establishes that legislative prayer *cannot* be government speech because such a conclusion, in effect, would authorize government to dictate every word of a legislative prayer. See, e.g., Johanns v. Livestock Marketing Ass'n, 544 U.S. 550 (2005). Regardless of one's view about whether Lee v. Weisman, 505 U.S. 577 (1992), applies in the legislative prayer context (it does), at the very least this Court's Establishment Clause jurisprudence establishes that the City Council would violate the Establishment Clause if it dictated the precise content – each and every word – of a legislative prayer. Unfortunately, this result is exactly what the Fourth Circuit's reasoning and the City Council's brief both contemplate and permit.

Because the City Council cannot dictate the precise content of prayer, it follows that private speakers – in this case Turner and other councilors – retain control over the content of their personally-formulated speech. The element of control is key. In fact, it is perhaps the key element in the government speech analysis. See Johanns, 544 U.S. at 560-61 (discussing government control of speech at issue).

While the City Council (and the Fourth Circuit) point to some indicia that it believes confirm such prayers as government speech – for example, that the prayer is listed on the official meeting agenda – the existence of such elements does not erase the critical role of the private speaker. This Court itself recently has considered that some speech may include elements of *both* private speech and government speech – what one might call

"hybrid speech," or "mixed speech." See, e.g., Tr. of Nov. 12, 2008, Oral Argument in Pleasant Grove City, Utah et al. v. Summum, Docket No. 07-665, pp. 10, et seq. (Attached as App. A-1). In such cases, the government should not be permitted to discriminate between and among religious viewpoints, which the City Council did when it censored Turner's personal speech. See Planned Parenthood of South Carolina, Inc. v. Rose, 361 F.3d 786 (4th Cir. 2004) (holding that viewpoint discrimination would be impermissible in hybrid speech cases).

In sum, the Court should grant the petition to settle the government speech issue, to consider the important private speech interests that are inherent in the context of individually-expressed legislative prayer and to confirm that individual expression remains protected from unlawful discrimination when non-proselytizing religious viewpoints are expressed in those prayers.

2. *Pelphrey* Is Relevant.

There is no question that the City Council is right on one other issue, namely that the decision in Pelphrey v. Cobb County, Ga., No. 07-13611 (11th Cir. Oct. 28, 2008), involved taxpayers who sued state actors for alleged violations of the Establishment Clause – and not a city councilor who sought relief from violations of his individual free speech rights and violations of the Establishment Clause. As discussed in Turner's supplemental brief, however, Pelphrey matters for two reasons: 1) The Eleventh Circuit has created a circuit split in addressing legislative prayer, because, in stark

contrast to the Fourth Circuit's holding in this case, the Eleventh Circuit acknowledged that the decision in Lee v. Weisman, and specifically that portion of Lee holding that it is no business of government to compose official prayers, *applies* in the legislative prayer context; and 2) The Eleventh Circuit recognized, in effect, that a policy attempting to differentiate between "sectarian" and "nonsectarian" prayer – or, in this case, "denominational" and "nondenominational" prayer – is a futile (and unconstitutional) task. On these two issues, the fact that the legal posture of the plaintiffs was different is not material, but the conflicting constitutional rationales are and require reconciliation between the federal circuits of the governing principles of law.

3. The Establishment Clause Issues Are Joined.

The City Council also downplays the Establishment Clause issues in this case, arguing that the Fourth Circuit never addressed whether sectarian prayers violate the Establishment Clause. (Br. in Opp., p. 15). This argument misses the point. Turner's Complaint, and his argument before the district court and the Fourth Circuit, was that the City Council could not *prescribe* nondenominational prayer and *proscribe* the use of the name of Jesus Christ without running afoul of the Establishment Clause. The Fourth Circuit's ruling that such a policy is constitutionally acceptable, in effect, puts at

risk the diversity of religious viewpoints in this country.[1]

The City Council's response to this argument is that since Marsh v. Chambers, 463 U.S. 783 (1983), prohibits exploitation of the prayer opportunity to proselytize or advance one religion, a city council is afforded broad latitude to adopt policies that act as a prophylactic against such unconstitutional outcomes. This argument, however, flips Marsh on its head and also ignores not only the unique circumstances in which the prayer was offered in this case, but the utter lack of any factual findings that the prayer opportunity had ever been exploited in this case (because it had not). Marsh says that the government cannot parse the content of a specific prayer unless there *first* has been a finding that the prayer opportunity was exploited to proselytize or to advance one particular faith over another.

Equally important, the City Council policy impermissibly entangles government in the nuances of religious doctrine and belief. The City Council must exercise its own standardless discretion to decide what is, and what is not, "nondenominational" prayer. Government officials

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[1] It also ignores the reality of the broad impact of the Fourth Circuit's decision. As noted in Turner's Petition, the Virginia State Police is now prohibiting chaplains from using denominational references in their prayers, a policy change that caused at least five chaplains to resign. See "Virginia Police Chaplains Quit Over New Prayer Policy," The Washington Times, Sept. 26, 2008; "State Police Chaplains Resign Over Prayer Restrictions," Richmond Times-Dispatch, Sept. 24, 2008 (Attached as Appendix B-1).

are plainly incompetent to make such judgment calls. The principles announced in Marsh and Lee v. Weisman recognized the danger of such parsing and prescription, but the City Council and the Fourth Circuit have abandoned those principles, effectively establishing a civic religion that this Court in Lee v. Weisman expressly rejected: "The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted." 505 U.S. at 590.

In sum, the City Council violated the Establishment Clause when it prescribed nondenominational prayer and proscribed use of the name of Jesus Christ. Its action is not authorized by Marsh v. Chambers, is expressly prohibited by Lee v. Weisman, and this Court should grant review to rectify the Fourth Circuit's error.

CONCLUSION

For these reasons and those set forth in Turner's original petition and supplemental brief, the Court should grant review and reverse the Fourth Circuit's decision below.

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[2] __ U. S. ___.

Respectfully submitted,

/s/

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December 5, 2008

APPENDIX

JUSTICE SOUTER: Mr. Sekulow, can I just ask: At what point in the litigation did you first raise the Government speech argument?

MR. SEKULOW: At the Tenth Circuit. The Tenth Circuit, the existing law in the Tenth Circuit in the Summum line of cases mandated a private speech determination, even if the speech was controlled or known by the Government, if it originated with a third party. As soon as we were before -- and under Tenth Circuit rules that's binding, of course, on the district court and on the panel.

But even in the panel brief, we raise the issue of Government speech and the Court addressed it both as to -- and, Justice Kennedy, going back to your point -- both as to Government speech and to the speech selection cases of Forbes, Finley, and American Library Association. And I think that those cases as well point to what's at issue here. Governments in the business of governing and determining the parks and the landscape of the parks make these kind of decisions.

JUSTICE SOUTER: Isn't the tough -- isn't the tough issue here not so much whether there is Government speech. I will assume and I do indeed assume that there is. Isn't the tough issue here the claim that there is -- is in fact a mixture, that it is both Government and private. And the argument for its continuing to be private speech I take it is simply the Eagles identification with the presentation and

their espousal of what the monument says. How -- how do you think we ought to deal with the mixture issue.

MR. SEKULOW: Well, I think the fact that it originated, that the monument originated by the Eagles as a third party, doesn't in any way take away from the fact that in this particular case, and in most cases involving donated monuments, which, as the United States would point to, most of the monuments in parks are donated by or originated with third parties –

JUSTICE SOUTER: They probably are, but most of them -- and you correct me if I'm wrong here. But I don't suppose that most of them -- most of them contain as part of -- in a prominent place in the monument itself contain the statement that, you know, this is the gift of or the position of or what-not of X, Y or Z, whereas this monument does.

MR. SEKULOW: Most of them, Justice Souter, do actually have statements. In fact, a perfect example would be at Gettysburg National Military Park a number of those monuments, most of them, are donated by or originated by third parties. They'll often say "Donated by," for instance, "the Father Corby –

JUSTICE SOUTER: We may have more cases coming.

MR. SEKULOW: I hope not.

JUSTICE SOUTER: But tell me, what is the criterion that we should use to decide what the significance of the private identification is?

MR. SEKULOW: I think the key should be, as this Court alluded to in Johanns, the issue of control, who controls the message ultimately here. And the fact is the Statue of Liberty originated by the Franco-American Union -- was originated by a third party. The United States by resolution accepted it. At that point title transfer.

JUSTICE GINSBURG: If that -- if we accept that there is Government speech, I think Justice Souter's question is isn't this really the Government endorsement of the Eagles' message? I mean, the Eagles are all over this monument, their symbol of the eagle, and the Eagles want it to be known that this is their monument. Indeed, I think in Van Orden wasn't the -- in the district court there, wasn't the statement, well, this -- Texas did this in recognition of the good work that the Eagles do in preventing -- - help try to prevent juvenile delinquency.

MR. SEKULOW: Right. And I think that actually points to why that once it's controlled and owned by the Government the fact that it originated in the third party, Justice Ginsburg, changes the equation for ownership and control to the Government.

JUSTICE SOUTER: Well, if it does, it changes it, as I understand your answer, by

eliminating the private aspect of the speech. So that your real answer to me is it's not a mixture.

MR. SEKULOW: It's not.

JUSTICE SOUTER: And there ceases to be a mixture the moment the Government accepts it.

MR. SEKULOW: Once -- right, title, and interest vest under Utah law in the Pleasant Grove City upon acceptance and at that point it is owned and controlled by the city. And the fact that it was originally created -- and Justice Ginsburg, you're correct, the district court and also the court of appeals in Van Orden stated that it was originated as a moral guidance for youth. That was the reason that the Fraternal Order of Eagles developed. The State of Texas said: We're going to honor the Eagles. That was their reason, as well as showing the role of the Ten Commandments and the rule of law. And then the Third-excuse me, Justice Stevens.

JUSTICE STEVENS: Can I ask you question

Virginia Police Chaplains Quit Over New Prayer Policy

GARY EMERLING
The Washington Times

LexisNexis

At least six of the Virginia State Police's 17 chaplains have resigned following a request they offer only "nondenominational" prayers during department-sanctioned public events and ceremonies, police said Wednesday.

The request was made by state police Superintendent Col. W. Steven Flaherty earlier this month and has been decried by Virginia House Republicans as a violation of the First Amendment and an attack on Christianity. One Republican delegate said chaplains were told they could not invoke the name of Jesus, but a state police spokeswoman denied the assertion.

To "require those troopers to disregard their own faith while serving violates their First Amendment rights and prevents them from serving effectively as chaplains," said House Majority Leader H. Morgan Griffith, Salem Republican. "These men had little choice but to resign."

Col. Flaherty asked the chaplains to offer only nondenominational prayers at public events, such as trooper graduations and annual memorial services. He said he was acting in response to a recent 4th Circuit Court of Appeals decision that dealt with

sectarian prayers offered at meetings of the Fredericksburg City Council.

He said chaplains whose beliefs conflict with the request could opt out of participating in such events. Col. Flaherty also said chaplains officiating at funeral ceremonies or counseling individual employees and their families were not bound by the request.

State police chaplains are sworn department personnel who are on duty and paid while performing in that capacity.

"This is not a forced situation," state police spokeswoman Corinne Geller said. "For those who are uncomfortable with that, we wouldn't put them in that position."

However, Delegate Charles W. "Bill" Carrico Sr., a former state trooper, said he has spoken with some of the chaplains, who said the colonel's request was not put in writing and was treated as an order.
The chaplains were told that "they cannot reference the name of Jesus Christ," said Mr. Carrico, Grayson Republican. "That's against their beliefs and against the dictates of their conscience."

But Ms. Geller, who was not at the meeting, insisted that Col. Flaherty "never once came out and said you cannot invoke the name of Jesus Christ or anything."

The issue of whether chaplains can pray in Jesus' name is not new.

In late 2005, Navy Lt. Gordon Klingenschmitt, an evangelical Protestant chaplain, staged a hunger strike in front of the White House to protest the Navy's policies of encouraging generic, nonsectarian prayers in public settings in place of petitions in the name of Jesus.

He was later court-martialed for appearing in uniform at what the Navy deemed a political protest and eventually discharged.

The controversy spurred several branches of the military to revise their guidelines on what chaplains can and cannot do. The Air Force, for instance, said it would not require its chaplains to offer nonsectarian prayers.

Ms. Geller said the colonel did not consult with Gov. Tim Kaine, Democrat, before issuing the request. She said the decision was "an internal matter" and "exclusively that of Colonel Flaherty."

Kaine spokesman Gordon Hickey also said the governor was not involved in the decision, but thinks it's "a reasonable action" because it allows denominational services for private events such as funerals.

"The governor has every confidence that Colonel Flaherty will direct the chaplains and all state troopers to adhere to the law," Mr. Hickey said.
He also criticized Mr. Griffith for what he termed a "political attack" on the faith of Mr. Kaine, a Catholic.

Mr. Griffith on Wednesday blamed the Kaine administration for "prohibiting the troopers from referencing Jesus Christ in public prayers."

"The last time I checked, the Catholic Church was in favor of Jesus Christ," he said.

Mr. Carrico and Mr. Griffith have pledged to work to reverse Col. Flaherty's decision. Mr. Carrico said he plans this week to begin an online petition and Web site, www.injesusnameipray.com.

Both lawmakers also said they are prepared to introduce legislation to reverse the decision when the General Assembly convenes in January.

"If the problem resolves itself, you might need to do protective legislation for the future," Mr. Griffith said. "We'll have to see how it plays out."

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RICHMOND
TIMES DISPATCH

State police chaplains resign over prayer restrictions

By STAFF REPORTS

Published: September 24, 2008

At least five members of the Virginia State Police chaplains program have resigned after being told they must abstain from praying in the name of Jesus Christ during department-sanctioned events involving the public.

Concerned about offending people of other faiths, state police Superintendent W. Steven Flaherty recently directed the agency's 17 chaplains to begin delivering neutral or non-denominational prayers at events such as trooper graduation ceremonies and its annual memorial service for fallen officers.

"The department recognizes the importance of a state government agency to be inclusive and respectful of the varied ethnicities, cultures and beliefs of our employees, their families and citizens at-large," Flaherty said in prepared statement to the Times-Dispatch.

The decision has offended nearly a third of the department's 29-year-old chaplaincy corp – all sworn officers – who have quit their ministerial posts in protest.

Their cause has been taken up by Del. Charles W. Carrico Sr., R-Grayson, who has contacted the Virginia Attorney General's Office for counsel and is launching a Web site – InJesusNameIPray.com – in a push to have the decision overturned.

"You don't check your religious beliefs at the door just because you're hired by the state and are a member of the department," said Carrico, a former state trooper, in a telephone interview.

"As must as I love the department,...this is a sad moment for me," he added.

Carrico believes the decision goes beyond a constitutional separation of Church and State.

"It a separation of Jesus and state, which offends me greatly," he said. "What we have here is an attack on the name of Jesus, on the name of Christ. And I'm not going to sit back and just let it happen."

Carrico said he intends on introducing legislation that would address the issue.

"In his statement, Flaherty said the decision is based on a recent ruling by the 4th Circuit Court of Appeals in Richmond, which upheld a Fredericksburg City Council ban on sectarian prayer. Council member Hashmel C. Turner Jr. sued the body in 2006 over its policy prohibiting references to specific religions in prayers used to formally open council meetings.

--Mark Bowes